"As to those women on whose part you fear *nushuz*, admonish them (first), (then) *wahjuruhunna fi'l madhaji'i* (abandon them in beds), (and last) *wadhrubuhunna* (hit them (lightly)); and if they obey you, seek not against them means (of annoyance or harm), for God is most high, and Great (above you all)."

Mr. Jaleb argued, in relation to this verse, that when Allah says that a husband is dominant over his wife, it means that the husband must provide for his wife (food and other needs), but only if she is obedient and keeps her husband's secrets. If she is not obedient, her husband is to give her advice. If she does not accept this advice, the husband must sleep separately from her, meaning that he will not have intercourse with her. According to the *hadith* of the Prophet (PBUH), when a man sleeps apart from his wife, the angels say imprecations until morning; it is the worst punishment he can impose. Mr. Jaleb stated that Islam never allows a man to beat his wife. *Hadith* make it clear that the chastisement allowed by the above verse can only be effected by a small twig, which should not be used on the face or leave marks. It is, in effect, symbolic. This is supported by the *sunnah*. Mr. Jaleb noted that the Prophet (PBUH) never used violence against his wives. Indeed, when his wife Ayesha was asked about him, she replied: "When he enters the house, he is at the service of his wives until he leaves."

There was no disagreement on the fact that a husband does not have a right under *shari'ah* to beat his wife, even if she disobeys him. Therefore, a husband does not benefit from a defence to domestic violence under Article 53 of the *Penal Code*, 1976 if his wife has been disobedient.

In meetings prior to the workshop, panellists had discussed the discrepancy between the *shari'ah* on this point, and its application by the courts and prosecutors in Afghanistan, which frequently inquire into a wife's obedience of her husband in domestic violence cases.

Panellists discussed how to address this discrepancy:

- Adopt a law, or legislative provisions, specifically criminalising domestic violence, including spousal abuse, in all instances and in all its forms; or at least

- Adopt a legislative provision relating to Article 53, and stating that there is no right under *shari'ah* that would provide a defence to spousal abuse, meaning that obedience by a woman of her husband is of no relevance to an investigation or prosecution of such violence.

In meetings prior to the workshop, Madam Saema Khogyani, Chairman of the Gender Commission of the *Wolesi Jirga*, speaking for herself and Ms. Balkhi, expressed that such suggestions would have the "full support" of the respective Gender Commissions of both houses.

Offence of rape

Rape constitutes an offence under the provisions of the *Penal Code*, 1976 relating to *zina* (Articles 427 and 428). (The offence of *zina* consists of sexual intercourse outside of marriage, including adultery.) Sexual violence not amounting to rape will also constitute an offence, under the provision relating to forceful violation of chastity (Article 429).) There is no separate offence of rape in Afghan law. As a consequence, victims of rape who make complaints to the police are frequently detained on suspicion that the sexual act was consensual, and sometimes prosecuted for *zina* themselves.

A victim of rape is not a criminal under Afghan law. A conviction for *zina*, as for any crime, requires that the requisite mental element be established (defined at Articles 34-35 of the *Penal Code*, 1976). A conviction also requires that the act have been committed with free will (Articles 65), and the *Penal Code*, 1976 sets out duress defences (Articles 94 and 95).

It was recommended that Afghan law be amended to provide a distinct offence of rape.

Ta'zir offence of zina

Fazl Ahmad Manawi, formerly First Vice President, Administration, Supreme Court of Afghanistan, argued during his intervention after the panel, that *hudood* crimes should not also be prosecuted as *ta'zir* offences. In particular, Mr. Manawi argued that to legislate a *ta'zir* offence of *zina* is contrary to Islamic law, given that the Qu'ran clearly sets out a separate *hudood* offence – the offence of *qazf* – of making an allegation of *zina* that does not satisfy the evidentiary requirements for the *hudood* punishment.

Mr. Warraich noted in his paper that this question is currently on appeal in the Pakistani courts.

Mr. Warraich also provided excerpts from the Pakistani case of *Abdul Qayum and another vs. The State* (1991 P.Cr L.J 568), in which the Federal Shariat Court warned against prosecuting women for *zina* on evidence less than that set out in the Qur'an:

> The prosecution agencies before putting people on trial for offences of Zina on flimsy allegations should be mindful of Injunctions of the Holy Quran and the message conveyed through the decisions from the early period of Pious Caliphs. The charge of Zina carrying a rigorous penalty of rajam or stripes should not be casually brought to court nor publicized. It shatters the foundation of a family whose female is accused of such a crime. Human weaknesses should rather be overlooked and ignored unless committed at public places and become a matter of concern from the society's point of view. It is most unbecoming of a stranger to peep into the

house of others and show inquisitiveness for detecting the sins of others, who are neither related to him nor he has a public duty to publish and propagate the evils of sinners.

In order to save the society from lewdness the Holy Quran says:-

> "Those who accuse chaste women but bring not four witnesses, sourge them with eighty stripes." (24:4)

> "Why did they not produce four witnesses, they verily are liars in the sight of Allah." (24:13)

From the contents of these verses it is clear that unless there are four eye-witnesses on the commission of the offence of zina, no one should accuse any person of that an no publicity should be given to any act of obscenity even if a God-fearing man hits at any such ugly scene. This is such a serious matter in Shariah that as mentioned in the above quoted verses the Holy Quran has laid down that if anyone accuses another person without producing four eye-witnesses, he will be punished with eighty stripes and his evidence will not be accepted in future.

In this connection the famous judgement of Hazrat Umar about Mughirah Ibn Shu'abah, the Governor of Egypt may be quoted:-

> "Three persons namely Abu Bakrah, Nafi'a and Shibl testified that Mughirah had committed adultery with a woman named Umme-e-Jamil. The fourth person named Zaid testified that the woman was not clearly visible and that he could not say definitely whether she was Umm-e-Jamil or not, and that he had only seen that the legs of a woman were lying on his shoulders and he has not seen more than that. On this Hazrat Umar released Mughirah and punished Abu bakrah, Nafi'a and Sibl with eighty stripes." (Al-Mughni, Ibn Qudamah, Vol. X, pages 178 and 179 printed Cairo, Egypt)."

Indeed, Mr. Manawi argued that *shari'ah* requires judges to act like defence lawyers in *zina* cases; they should try to create doubt. He noted that the only times *zina* was punished during the time of the Prophet (PBUH), there had been a confession. Conversely, the offence of *qazf* – an unsubstantiated allegation of *zina* – was punished during the life of the Prophet (PBUH).

Forced marriage, including child marriage

During working session no. 3, Wakil Aminy, Chief of the Division of Investigation at the AGO, made comments on the issue of forced and child marriage, and the shortcomings of Afghanistan's criminal law in this regard. This issue was also the subject of many written submissions, including that of Sayed Jalal Jalal, of the AGO.

Many noted that forced marriage, including the marriage of children, is the root cause of other forms of violence against women, and other types of criminal activity.

Forced marriage is also inveighed against in the Qur'an and contrary to the *shari'ah*. For example:

> *Surat al-Nisāa,* Verse 19: "O ye who believe! It is not lawful for you forcibly to inherit the women (of your deceased kinsmen), nor (that) ye should put constraint upon them that ye may take away a part of that which ye have given them, unless they be guilty of flagrant lewdness. But consort with them in kindness, for if ye hate them it may happen that ye hate a thing wherein Allah hath placed much good."

Panellists argued that child marriage is always forced marriage, as children can never meaningfully consent to marriage (or any other contract). This is reflected in the *Civil Code*, 1976, which provides:

> Article 70 Marriage shall not be considered adequate until the male completes the age of 18 and the female the age of 16.
>
> Article 71
> 1. Where the girl does not complete the age provided under Article 70 of this law, the marriage may be concluded only through her father or the competent court.
> 2. The marriage of a minor girl whose age is less than 15 shall never be permissible.

Mr. Aminy also noted that forced marriage, including child marriage, is prohibited by international human rights instruments. He mentioned the *Universal Declaration of Human Rights*, which provides at Article 16(2): "Marriage shall be entered into only with the free and full consent of the intending spouses." He also mentioned the *International Covenant on Civil and Political Rights*, which provides at Article 23(3): "No marriage shall be entered into without the free and full consent of the intending spouses."

However, while forced marriage is a crime according to the Afghan *Penal Code*, the crime is limited to the marriage of women of 18 years or more. Article 517 of the *Penal Code*, 1976 provides, in relevant part:

> (1) A person who gives in marriage a widow, or a girl who is eighteen years or older, contrary to her will or consent, shall be sentenced in view of the circumstances to short imprisonment.
>
> (2) If commitment of the crime specified under the above paragraph is for the purpose of "Bud dadan" (as a compensation for a wrongdoing), the offender shall be sentenced to medium imprisonment not exceeding two years.

Various panellists, including Mr. Aminy, recommended that the criminal law of Afghanistan be amended to:

- criminalise child marriage; and

- increase the sentence for forced marriage, including child marriage.

As further discussed below, it was also recommended, including by Mr. Yunous during working session no. 1, that Article 517 be amended to allow prosecution without the complaint of the victim (hich is currently precluded by Article 517(3)).

Prosecution of women for activity that is not criminalized by legislation but is considered immoral – for example, running away from home:

A significant proportion of women in jail in Afghanistan are there for having run away from home. In his submission, Afzal Nooristani, of the Lawyers Union of Afghanistan, cited medica mondiale statistics from *Pull-e-Charkhi* jail in Kabul. Of the 80 women that are in this jail, 20 women were accused or convicted of escape from home. Of these 20, 11 have been sentenced to penalties, which range from 6 months to 14 years imprisonment.

Mr. Nooristani noted that all of these women had identified forced marriage, beating, forced labour and other types of violence as the main reason for their escaping from home. In her submission, Nafeesa Hemat Khail, of the Investigation Department of the AGO, related the case of Bakhtawar:

> I was 7 years old when my father gave me in marriage to a 70-year-old man by the name of Moulawi Mohammad Yousuf. My husband wanted to make money by forcing me to have sexual relations with other people, but I didn't accept that. My husband was beating me all the time and finally I ran away with the son of our neighbor. He took me to his cousin's house and he raped me there. Then we were arrested.

Ms. Mbabazi also related cases of running away from home, and described how these women are victims of crimes rather than perpetrators.

The mere act of running away from home is not a crime according to Afghan legislation.

Notwithstanding, arrests are made, and the activity is prosecuted and punished. In so doing, judicial professionals claim to be acting pursuant to Article 130 of the *Constitution of Afghanistan*, which provides:

> While processing the cases, the courts apply the provisions of this Constitution and other laws.
>
> When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible manner.

Mr. Nooristani argued that this view of Article 130 "is not easily acceptable":

> … if we look at the text of the article, we can see that referring to Hanafi jurisprudence must be "within the limit of the Constitution", not beyond the limits mentioned in the constitution. Article 27 clearly limits Article 130 of the constitution, which means that it has accepted the principle of legality, and criminal cases are distinct from civil or commercial cases. Therefore, Article 130 allows resort to *shari'ah* only in civil and commercial cases, and not in criminal cases.

Mohammad Yunous, of the Criminal Department of the AGO, made a similar argument in his submission (although seemingly took the opposite view in his comments during working session no. 1):

> Article 2 of the *Penal Code* provides that: "No act shall be considered crime, but in accordance with the law." Article 3 further provides that: "No one can be punished but in accordance with the provisions of the law which has been enforced before commitment of the act under reference." The issue is that running away has not been codified in the *Penal Code*, and we can not punish someone for an act which the law does not describe as a crime.

Mr. Nooristani argued that to permit courts to disregard the principle of legality and criminally to sanction non-criminal acts pursuant to Article 130, would render meaningless the separation of powers established by the *Constitution of Afghanistan*, and result in tyranny.

Mr. Nooristani also noted that Article 130 requires that courts first "use the constitution and other legislation, which means if there is a solution or decision in the constitution or other legislation, there is no further enquiry." He referred to Article 1 of the *Penal Code*, 1976, which states that the code is intended to regulate *ta'zir* crimes and penalties, and argued: "The *Penal Code*, 1976 covers all crimes and penalties of *ta'zir*, which means that, except for the crimes and penalties provided in the law, there are no crimes and penalties of *ta'zir* to be judicially pursued."

In his intervention during the discussion period, Mr. Manawi strongly supported the interpretation of Article 130 of the *Constitution of Afghanistan* that limits its application – and therefore the ability of courts to refer to Hanafi jurisprudence to fill lacunae in the law – to non-criminal cases.

Subsequent comments by intervenors, however, illustrated that there is a lack of understanding within Afghanistan's judiciary that Article 130 of the *Constitution of Afghanistan* does not allow criminal sanction of acts not criminalized by legislation. This should be made more explicit in the law. It should also be reinforced by sanctions for judges who disregard the law in this regard, and by compensation for those unjustly convicted as contemplated by Article 55 of the *Constitution of Afghanistan*, which provides: "Any person suffering undue harm by government action is entitled to compensation, which he can claim by appealing to court."

Such legislative clarification regarding Article 130 may, however make little difference to the practice of prosecuting and punishing "running away from home". The law should also be amended to state specifically whether or not this is a crime, in a manner similar to Article 425 of the *Penal Code*, 1976, which provides:

> A person who carries off a girl, who is sixteen years or over, at her own will from her parents' residence for the purpose of lawfully marrying her, shall not be deemed as having committed an act of kidnapping.

Ashraf Rassouli, Advisor Minister (*Mushawr Wazir*) to President Karzai, recommended by way of conclusion to working session no. 2 that, if a judge or prosecutor is of the view that an act should be subject to criminal sanction, he or she should submit his or her recommendations to the relevant legislative departments for inclusion in the criminal law.

Various members of the AGO – for example, Mr. Yunous, and also Zahera Dastagir Ijad, Head of Central Public Security Prosecution Office, in her submission – argued that running away should be made a crime by legislation (implying that it cannot now be prosecuted). However, Minister Rassouli, speaking during working session no. 2, noted that no offence of running away exists in Hanafi jurisprudence. A number of intervenors, including Mr. Warraich, noted that to argue that there is an offence of running away from home under Hanafi jurisprudence is to confuse civil obligations and criminal matters.

Working session No. 2, Criminal Law – Procedure:

Working session no. 2, Criminal Law – Procedure, was moderated by Kalimullah Malikzai, Deputy Attorney General. He began the session by contextualising the discussion of gender issues in Afghanistan's criminal procedure law: the AGO has presented a draft new criminal procedure code to the *Taqnin*. Abdul Mahmood Daqiq, Attorney-General of Afghanistan, had been quoted earlier as saying that "this technical workshop will provide the first opportunity to discuss what this law should include to fully respect the rights of women victims of violence and, more generally, of all victims of crimes."

Douglass McCrae, co-ordinator of IDLO's training program for defence lawyers, began the discussion with a history of the protection of women against violence in the U.S., illustrating how legislation and its rigorous enforcement by the judicial system can drive social change. He then provided examples of relevant legislative provisions that might be considered for Afghanistan.

The other panellists then addressed the relevant criminal procedure law of Afghanistan, the manner of its application and its suitability to its social context. As further outlined below, the session and subsequent discussion focused on two broad issues: (1) How can the interests of victims and witnesses most effectively be respected? (2) Can crimes such as running away from home not set out in legislation be prosecuted?

Minister Rassouli concluded the session by recommending that legislative measures be introduced to more effectively respect the interests of victims and witnesses: prosecution of violence should be allowed on the complaint of third parties in certain circumstances, victims should be dealt with fairly and in a humane fashion, and provision should be made for their security and protection.

Minister Rassouli also urged that the principle of legality be respected by Afghanistan's judicial institutions. No judge should be able to act as a legislator by punishing an act that is not a crime according to legislation. If a judge or prosecutor is of the view that that act should be subject to criminal sanction, he or she should submit his or her recommendations to the relevant legislative departments for inclusion in the criminal law.

How can the interests of victims and witnesses most effectively be respected?

Requirement of victim complaint for prosecution

Violence against women is understood to be widespread in Afghanistan. Various forms of violence against women are crimes under Afghan legislation. For instance, as noted above, domestic violence may constitute the crime of beating and laceration. However, cases of violence against women are prosecuted and punished only in the most extreme circumstances, if at all.

Panellists argued that this is partly due to the requirement that prosecution of such crimes in many cases requires a criminal complaint by the victim.

The general rule under Afghan law is that the prosecutor must institute criminal proceedings where there is "grounded evidence" that a crime has been committed (*Interim Criminal Procedure Code*, 2004, Articles 22 and 39). For certain types of crime, however, the prosecutor cannot bring a case to court unless there has been a complaint by the victim. This is the case:

- For domestic violence where the perpetrator is the husband of the victim, or one of the victim's "roots or branches" (*Penal Code*, 1976, Article 476);
- For *qazf* (*Penal Code*, 1976, Article 440), which is an unsubstantiated allegation that another has committed *zina*; and
- For forced marriage (*Penal Code*, 1976, Article 517(3)).

Hangama Anwari, AIHRC Commissioner, argued that it is not realistic in Afghanistan to expect a victim of domestic violence, forced marriage or *qazf* to complain to the judicial authorities. Generally speaking, the same lack of empowerment that is at the root of these crimes will prevent women from complaining. A woman may be further prevented from making a complaint of battery and laceration by physical or mental consequences of that crime. A woman whose relationship with her family was such that she was forced into marriage is unlikely to then be able to turn against that family structure to make a criminal complaint, or even know that her being forced to marry is a criminal act. Indeed, Ms. Anwari pointed out that there has never been a prosecution under either Article 517(1) for forced marriage or Article 517(2) for forced marriage by way of compensation in "bad".

Various intervenors agreed.

Ms. Anwari recommended that legal provisions requiring a victim complaint to prosecute violence against women should be revised.

Minister Rassouli recommended that legislation be amended to allow prosecution of violence against women on the complaint of third parties in certain circumstances. During working session no. 3, Wakil Aminy, Chief of the Division of Investigation at the AGO, recommended that Article 517 be amended to allow prosecution of forced marriage without the complaint of the victim.

Testimony of women

In meetings prior to the workshop, Aziza Adalutkhowa Kohistani, a lawyer working at medica mondiale, outlined the steep evidentiary requirements imposed by courts in cases of violence against women. The testimony of women victims is not considered as evidence. Where spousal abuse occurs, even the testimony of the woman's family members is given little or no weight.

There is no basis in Afghan legislation for this bias.

Ms. Anwari stressed that the judicial system, and courts in particular, should give more weight to the testimony of women. Although this can and should be accomplished without legislative amendment, it was recommended that the criminal procedure law of Afghanistan be amended to set out evidentiary principles consistent with Article 22 of the *Constitution of Afghanistan*, 2004 applicable in cases of violence against women – for example, one woman's testimony is sufficient for conviction if believed – and applicable to women's testimony more generally. It was also recommended that the law set out standards and procedures for investigation in such cases.

Ms. Anwari noted that "Justice for All", the 10-year justice blueprint developed by Afghanistan's judicial institutions and approved by the Afghan Cabinet in October 2005, speaks to victim and witness assistance. At item 3.3, it states:

> In a country rife with violence against women and children, it is essential to devise programs program to protect them from further victimisation when they are caught up in legal process. Equally, where intimidation by strongmen makes it difficult to persuade people to give evidence, there is a need to provide victims and witnesses with protection, and, in very serious matters, relocation.
>
> Assistance should include in-court procedural protection such as screens and facilities at some courts for technical means (video links) for giving evidence out of court (e.g. for victims of rape, child witnesses, etc). There are many other steps which could be taken to improve witness assistance, both in and out of court, such as the allocation of trained social workers to counsel and explain court procedures; arranging travel; identifying needs for social assistance to compensate



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Recommendations and Summary of Discussions

for loss of earnings; training police in risk assessment; arranging re-housing; referrals to specialist counselors where necessary; and providing waiting rooms for witnesses at court so they do not have to wait in the public areas. In the context of Afghanistan a witness assistance service should entail different levels of risk assessment and protection services, such as guards during the trial, temporary shelter in a safe house, and where necessary, re-location of witnesses for the most serious cases.

Like legal aid, this service must be made available first at the Primary Court level. The Government foresees a small number of resources (either state employees or private lawyers when they exist) in provincial capitals, with one person in larger districts. It will be particularly important to have female workers for this work. There should be at least one place in every province where women or children can be accommodated in a secure setting until they can find their own accommodation.

In particular in relation to giving evidence in court, Ms. Anwari noted Article 52(2) of the *Interim Criminal Procedure Code*, 2004, which provides in relevant part: "Hearings are open to the public except when the court decides that all or part of it shall be run without the presence of the public for reasons of morality, family confidentiality or public order."

Ms. Anwari recommended that the law be amended to be explicit in also allowing witnesses to give evidence in confidentiality when their security is at risk. This is important, she argued, for the effective prosecution of crimes as a general matter (not only violence against women), given the current situation in Afghanistan. It is, though, particularly true of prosecutions of certain types of violence against women (in particular, sexual violence), prosecution of which may expose victims to murder by family members in the name of honour.

In fact, Article 128(2) of the *Constitution of Afghanistan*, 2004 already allows courts to conduct any part of a trial *in camera* if the security of the witness so requires, as it permits courts to do so not only in situations provided in the law, but also "in situations in which the secrecy of the trial is deemed necessary".

Ms. Anwari also urged that the other measures relating to victim and witness assistance recommended by "Justice for All" be implemented, including in law as necessary.

Prosecution of rape victims for zina

Mohammed Jawid Shaban, of the Lawyers Union of Afghanistan, related the story of Mahjabeen. Mahjabeen filed a complaint with the police that she was raped by armed men. Instead of arresting the rapists, however, the police referred her case to the AGO for prosecution. The prosecutor in charge of her case used her complaint of rape as a confession of *zina*. An expert medical examination to which she was subjected was used to establish that intercourse

had occurred, and understood to corroborate the ostensible confession. She was indicted for *zina*, and convicted at trial to 5 years in prison.

Mr. Shaban pointed out that this not only violated the substance of the criminal law, but also many aspects of the procedure law, including the right to a defence. Further, if complaints of rape continue to be treated as confessions of *zina* by the judicial system, rape victims will continue not complaining of these crimes to the police, and therefore the occurrence of these crimes will continue undocumented, as well as unpunished.

As noted above, although rape constitutes an offence under the provisions of the *Penal Code*, 1976 relating to *zina* (Articles 427 and 428), there is no separate offence of rape in Afghan law. As a consequence, victims of rape who make complaints to the police are frequently detained on suspicion that the sexual act was consensual, and sometimes prosecuted for *zina* themselves. As also noted above, a victim of rape is not a criminal under Afghan law.

Legislative measures are required to address the re-victimisation of rape victims by the criminal justice system of Afghanistan. In addition to legislating a separate offence of rape, procedural protections against the prosecution of rape victims should be introduced.

The excerpts from the Pakistani Federal Shariat Court's decision in the case of *Mst. Safia Bibi vs. The State* (NLR 1985 SD 145) provided by Mr. Warraich may be of interest here. Mr. Warraich explains that Safia Bibi was a young blind girl who was raped. She became pregnant as a result of the rape. The girl was convicted for *zina* by the trial court because she was unmarried and pregnant, yet unable to identify her rapist (as she was blind). The appeal court acquitted her, reasoning:

> Even under Shariah if a girl makes such a statement as made in the present case, she cannot be convicted of zina. The principle of Fiqh is that she will be asked about the cause of pregnancy, if she says that she was forced to commit adultery or someone had committed sexual inter-course with her under suspicion about her identity, her statement will be accepted and she will not be convicted. This is based on the tradition of Hazrat Ali that when Shuraha came to him and said, "I have committed adultery", Hazrat Ali said to her, "You might have been forced or someone might have committed sexual inter-course with you while you wee sleeping". (Kitabul Fiqh alal Mazahibil Arabaa (Urdu translation) Vol. V, page 166, 167.)
>
> If an unmarried woman delivering a child pleads that the birth was the result of commission of the offence of rape on her, she cannot be punished. This is the view of the Hanafis and the Shafis. But Imam Malik said she shall be subjected to Hadd punishment unless she manifested the want of consent on her part by raising alarm or by complaining against it later.

Can crimes such as running away from home not set out in legislation be prosecuted? Can individuals who have engaged in these acts be arrested?

As discussed above, the mere act of running away from home is not a crime according to Afghan legislation. Notwithstanding, arrests are made, and the activity is prosecuted and punished, ostensibly pursuant to Article 130 of the *Constitution of Afghanistan*, 2004.

Both Mr. Malikzai and Abdul Wadood Jawhari, Advisor of Supreme Court, expressed the view that new crimes are constantly manifesting themselves in society, making it impossible for legislation exhaustively to define all unwanted activity as crimes. Therefore, Article 130 should allow prosecution of activity that is not addressed by legislation. Judge Jawhari relied, in support of this view, on Article 3 of the *Constitution of Afghanistan*, 2004.

Mohammad Zaman Sangari, Chief of the Anti-Narcotics Secondary Court, argued that it is not fair to prosecute victims of domestic violence who run away from home.

Minister Rassouli spoke at length about the principle of legality. He noted that it is respected in the Qu'ran and *shari'ah*, as well as at international law (e.g. the *Universal Declaration of Human Rights*, and the *International Covenant on Civil and Political Rights*), and adopted at Article 27 of the *Constitution of Afghanistan*, 2004, and set out in Afghan legislation (e.g. Articles 2, 3 and 21 of the *Penal Code*, 1976; Article 78(a) of the *Interim Criminal Procedure Code*, 2004).

> **Qur'an,** *Surat Bani Isra'il* XVII:15
>
> ... nor would We Visit with Our Wrath until We had sent an apostle (to give warning).
>
> See also *Surat al-An'am* VI:19, *Surat al-Nisāa* IV:165, *Surat al-Qasas* XXVIII:59, and *Sura al-Fatir* XXXV:24.
>
> ***Constitution of Afghanistan*, Article 27**
>
> No act is considered a crime, unless determined by a law adopted prior to the date the offence is committed.
>
> No person can be pursued, arrested or detained but in accordance with the provisions of law.
>
> No person can be punished but in accordance with the decision of an authorized court and in conformity with the law adopted before the date of the offence.

Judge Sangari agreed. In relation to Article 130, he reiterated that the Qu'ran, and *shari'ah* more generally, and the Afghan legal system, respect the principle of legality.

Minister Rassouli and Judge Sangari argued that this precludes reference to Hanafi jurisprudence under Article 130 in criminal matters, as Article 130 requires any reference to Hanafi

jurisprudence to be "within the limits of this Constitution", including its Article 27. As discussed during working session no. 1, a judge can only apply Hanafi jurisprudence pursuant to Article 130 in civil and commercial cases.

Further, Article 130 refers only to courts. No equivalent ability to refer to Hanafi jurisprudence is granted to police or prosecutors. On the contrary, Article 134 of the *Constitution of Afghanistan* provides, in relevant part: "Discovery of crimes is the duty of the police and investigation and prosecution are conducted by the Attorney's Office in accordance with the provisions of the law." Both Minister Rassouli and Judge Sangari concluded, in relation to the act of running away from home, that because it is not a crime according to Afghan legislation, it cannot be prosecuted by the AGO.

Article 130 of the *Constitution of Afghanistan*, 2004, also cannot provide grounds for arrest. Articles 30 and 35, respectively, of the *Interim Criminal Procedure Code*, 2004 set out the situations in which police can arrest on their own initiative, and in which arrest can be ordered by the Saranwal. There can only be arrest of an alleged criminal, the alleged crime must be either a felony or a serious misdemeanour, and only under certain conditions. Running away from home is not a crime, and therefore one who runs away from home is not a criminal and cannot be arrested.

This working session illustrated that there is a lack of understanding within Afghanistan's judicial institutions that Article 130 of the *Constitution of Afghanistan* does not allow arrest for, or criminal conviction or prosecution of, acts not criminalized by legislation. This should be made more explicit in the law, which could be accomplished either in the criminal procedure law, or the laws relating to the police and prosecutor. These provisions should be reinforced by sanctions set out in legislation for police or prosecutors who disregard the law in this regard, and compensation for those unjustly detained or prosecuted as contemplated by Article 55 of the *Constitution of Afghanistan.*

Working session No. 3, Implementation of the Criminal Law:

As mentioned above, violence against women is understood to be widespread in Afghanistan, and is criminalized in its various forms by Afghan legislation. However, complaints are rarely made to the police, and few of those complaints result in criminal convictions. Working session no. 3, Implementation of the Criminal Law, discussed institutional mechanisms that exist, and that may be introduced, to address this problem. The session was moderated by Michael Hartmann, Advisor to the Attorney General of Afghanistan (Justice Sector Support Program, U.S. State Department, Bureau INL).

Mechanisms at police stations and within the MOI

District 9 Police Station Commander Colonel Abdul Khaliq, who was Commander of District 10 Police Station when its pilot Family Response Unit (FRU) was established and is now establishing an FRU at District 9, related the case of a woman who was chained and beaten by her new husband. The husband had discovered that the woman was not a virgin. The woman had not told anyone that she had been raped some years previously by a family member. This was revealed only when Colonel Khaliq asked one of the police women at District 10, who was then working as a cleaner, to try to speak to the victim. It was from this type of experience that the District 10 FRU grew, on the initiative of American police mentors.

Colonel Khaliq outlined how the FRUs facilitate the lodging of criminal complaints by women victims of violence, and thereby contribute to ensuring effective enforcement of the law in this area. LaFrance Davis, the American Police Mentor who supported the FRU pilot project at District 10, made recommendations for buttressing this progress. Recommendations are also included in the Spring 2006 report of Tonita Murray, Police Gender Advisor to the MOI, entitled "Evaluation of the Family Response Unit – District 10 Police Station Kabul", included in the materials.

The FRU at District 10 police station has a separate entrance, and is staffed entirely by women police. This means that victims of violence do not come into contact with male police officers. The necessity of dealing with male police, who may be hostile, is understood to deter women from making complaints. Also, because the FRUs are staffed by women police officers, victims can more freely describe their problems. Absent women officers, it is the victim's husband or brother who communicates with the judicial organs. The FRU also provides an opportunity for women police to engage in meaningful police work.

The FRU pilot at District 10 is now being replicated at police stations elsewhere in Kabul, as well as in Herat, Mazar-i-Sharif and Kunduz. In his submission, Major General Abdul Rahim

(Shajah), Chief of Criminal Investigation at the MOI, recommended that the MOI establish departments devoted to the elimination of violence against women in all police stations.

FRUs should be created in other police stations. This will involve recruiting additional female officers. The police officers that are assigned to the units should have solid training in police techniques and family violence response techniques.

The FRUs are not currently included in the organisational structure – the *tashkiel* – of the MOI. Therefore, their survival is dependent on the commanders of the stations in which they exist. Their lack of permanence means the FRUs are not given full support by other police in the station. Further, they have no material support from the MOI, the ANP, MOWA or the U.S. military. The FRUs should be included in the *tashkiel* of the MOI. They should be given a clear mandate, and defined roles and responsibilities, and shouldbe provided sufficient financial and other resources to operate.

If a complaint received by the FRU involves criminal activity, the criminal investigation unit (CIU) and the FRU work in concert, with the CIU investigators concentrating on the suspect and the FRU on the victim. If a case is not concluded within 24 hours, it must be transferred to the Central District CIU at the Kabul Police Centre (KPC), which then assigns the case for investigation as appropriate. All contributions from the MOI recommended that investigative officers be trained in family violence and that eventually, the staff of the FRUs should be given investigative responsibility.

Certain cases are not referred for investigation, but are mediated by the FRU police or the station commander. Police are not trained as family counsellors. Mediation will often result in returning women to the abusive home. There is a practice among police, as well as among private lawyers and the courts, of resolving both criminal and civil cases of violence by obtaining a written agreement from the perpetrator to commit no further violence. Such bonds may actually dissuade further violence, and are intended to provide strong evidence in the case of recidivism. However, this approach likely means that justice is denied to victims. The submissions of Ms. Davis and Ms. Murray recommended that there be clear policies and procedures that define the role and responsibilities of the police in family violence matters, including their limits.

It was recommended that protocols be developed for collaboration between the police and women's shelters, both to provide security to shelters, and to provide an alternative to protective detention for women victims of violence who make complaints to the police, and women and girls accused of *zina* crimes and at risk of violence from their families. Various panellists, including Ms. Anwari during working session no.2, noted that shelter capacity must also be enhanced.

Mechanisms to improve police-prosecutor collaboration

Colonel Khaliq noted that the problem with the current system in the MOI – that cases are referred to the KPC – is that station police then have no involvement in the investigation or prosecution of cases. The FRU officers therefore have no ability to follow up on victim complaints, or provide support to them during prosecution.

The file that is sent to the KPC by the station police is a paper file. It is MOI policy that the case be referred by the station police to the KPC within 24 hours, among other reasons due to lack of detention facilities. Most police officers have only a limited ability to write. This suggests that the file, which will provide the basis for the prosecution's case, could usefully be supplemented by direct interaction between police and prosecutors.

According to Mr. Aminy, except in cases where the police itself is being investigated for negligence or criminal activity, investigating prosecutors do not contact the station police in conducting their investigations. Although prosecutors are required to be present at investigations, either they do not present themselves or they rush the police. Police are never called by prosecutors to testify in court.

It was recommended that protocols and procedures for collaboration between the prosecutors and police in investigation and prosecution of violence against women, including rape, be established. A MOI-AGO committee to monitor the progress of such cases, potentially also with international advisor, should also be considered.

Mechanisms at hospitals

Colonel Khaliq noted the lack of co-operation between Afghan government institutions in relation to the prosecution of violence against women.

Women who suffer injuries as a result of domestic or other types of violence may go to a hospital for treatment. However, hospitals do not currently inform the prosecutor's office or police of criminal activity, with the consequence that the family is able to maintain the secrecy of the crime.

Colonel Khaliq recommended, as did Ms. Anwari during working session no. 2, that measures be taken in hospitals to ensure that criminal activity against women comes to the attention of the police or prosecutor's office. Colonel Khaliq argued that hospitals should adopt a policy of communicating, or be required to communicate, cases of violence against women to the police

and prosecutor's office. Ms. Anwari suggested that that legal officers be appointed in hospitals.

Colonel Khaliq also recommended that there be greater co-operation between judicial and educational organs – the Attorney-General's Office, the Ministry of Pilgrimage and Hajj and Police – in relation to the prosecution of violence against women.

Mechanisms within the AGO

There is no uniform application of standards within the AGO. Certain prosecutors will prosecute certain cases of violence against women, and not others.

According to Mr. Aminy, it is the policy of the AGO that cases involving violence against women are investigated by women if there are women in the relevant provincial investigation departments. However, there are only women prosecutors in Kabul, Herat and Mazar-i-Sharif.

There are no units dedicated to the prosecution of violence against women.

Ms. Davis recommended the creation of specialist units, or the designation of specialized officers, with the capacity to investigate and prosecute cases of violence against women, and that these units be placed across provinces and districts.

Mr. Hartmann spoke to the practice of prosecutors in the U.S. (San Francisco) and the U.N. (Kosovo) in relation to violence against women. He described how specialized units in police and prosecutors' offices ensure effective enforcement of the law on violence against women. The panellists agreed that such measures could be useful in Afghanistan.

It was recommended that specialized units be created in the prosecutor's offices to deal with violence against women, and that the AGO, in consultation with the police, develop guidelines on when a case of violence against women will be prosecuted based on the severity of the injuries and on the previous history of violence.

Mechanisms relating to the use of expert examinations and forensics

Dr. Soraya Sobhrang, AIRHC Commissioner and former forensic doctor, drew the attention of the technical workshop to Article 32 of the *Interim Criminal Procedure Code*, 2004, which provides in relevant part:

1. In case of flagrante delicto and whenever there are grounded reasons to believe that urgent action is needed to preserve the evidence the judicial police can, on their own initiative, conduct preliminary investigations which include: [...]

   (d) requesting the assistance of experts for performing activities which require special professional qualification.

There is little consistency in the use of expert medical testimony in cases of violence against women. Wakil Aminy, Chief of the Division of Investigation at the AGO, related a case to demonstrate the negligence (if not worse) of police and prosecutors in investigating cases of violence against women. A man had beaten his pregnant wife so severely that she miscarried, and eventually died. The case had originally been dismissed by the prosecutor's office on the grounds of the husband's alleged insanity. Mr. Aminy's review of this dismissal revealed that there had been no basis whatsoever for this finding: the allegations of insanity had been believed by the investigating prosecutors without a medical examination.

Dr. Sobhrang noted that, while murder cases are routinely sent for forensic evaluation, cases involving violence against women – physical violence, forced marriage etc. – are not. The paper of Ms. Murray noted that police do not collect physical evidence – e.g. biological samples – in cases of violence against women. According to Dr. Sobhrang, judicial organs reason that there are no female forensic doctors, and therefore send cases of violence against women to hospitals instead. The problem, according to Dr. Sobhrang, is that the doctors at these hospitals do not have forensic experience. Ms. Murray also noted that police are not able to visually document injuries, as they have no cameras.

It was recommended, including by Dr. Sobhrang and Ms. Murray, that:

- cases of violence against women routinely benefit from forensic analysis,
- forensic medicine facilities be ameliorated, including in the provinces, and
- relevant equipment be procured and provided not only to police stations, but also to hospitals.

Mr. Hartmann described how investigative procedures have been made more effective in other countries by the creation of standardized forms for medical and judicial professionals. He gave the example of a 5-page form for doctors and nurses used in San Francisco and Amman, Jordan. In other countries, the police and doctors in hospitals are provided with special instructions for dealing with victims of rape and domestic violence. It was recommended that such forms be developed for, and adopted in, Afghanistan.

Dr. Sobhrang also recommended that sufficient numbers of female forensic examiners and medical experts be recruited and trained to ensure that women are available to examine victims.

Dr. Sobhrang noted in her submission that the likelihood that the medical examiner will be male dissuades victims from making complaints of rape. Also, the 2005 *Police Law*, at Article 16(2), states that: "The women can be searched by the policewoman or a woman who is assigned by police."

There is also little understanding of how expert medical testimony should be used in criminal prosecutions.

Dr. Sobhrang described the routine use of virginity tests in cases of rape and where women are suspected of having sexual intercourse outside of marriage. Such tests are even conducted at random in certain provinces. She pointed out that so-called "virginity tests" – which really only determine whether the hymen of a woman is intact or not – cannot establish with certainty that a woman has, or has not, engaged in sexual activity. A girl may never have engaged in sexual activity, but have a torn hymen as a result of physical activity. Alternatively, the hymen of some women does not tear with sexual activity, but only on giving birth. Therefore, so-called "virginity tests" can have only limited probative value in determining whether a woman has engaged in sexual intercourse.

Further, medical examinations of this sort are often treated as establishing guilt or innocence of a woman accused, rather than as establishing the facts on which such findings may be made.

Panellists recommended that forensic training be conducted with police, prosecutors and medical personnel. This training should cover relevant scientific concepts and methods – e.g. use of blood typing and DNA testing, how to distinguish between defensive wounds and accidental wounds, use of technology to identify microscopic wounds resulting from non-consensual sexual activity. The training should also address the manner in which expert medical evidence should be used in a legal case.

Dr. Sobhrang argued that a medical examination of a victim can be conducted only with her consent. This finds support in the *Interim Criminal Procedure Code*, 2004. Article 37, which allows the prosecutor to seek "expert exams and evaluations", constrains the prosecutor's ability to order such exams: The exam must provide "relevant" evidence, and the exam must be conducted on a "suspect" of a crime. If not ordered by the prosecutor, judicial police are allowed to force expert exams only where the two conditions set out at Article 32(1) are met: First, it must be a case of "flagrante delicto". Second, there must be "grounded reasons to believe that urgent action is needed to preserve the evidence". Neither is likely to be the case.

Mr. Hartmann also argued that, to enable the prosecutor or police to force a woman to undergo a test involving looking at sexual parts would likely violate the guarantees of dignity and privacy recognized at Articles 24 and 37, respectively, of the *Constitution of Afghanistan*, 2004.

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Interpreting the right to privacy set out at Article 17 of the *International Covenant on Civil and Political Rights*, the Human Rights Committee has stated:

> So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex. (General Comment No. 16: "The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)", Thirty-second session, 1988.)

Mr. Manawi argued, in his intervention during the discussion period after working session no. 1, that investigative medical examinations cannot be required in cases of "running away". Aside from the fact that this is not a crime, Mr. Manawi argued that such investigative exams are inconsistent with the Qu'ran and *shari'ah*, which exhort that sexual matters be hidden from public view.

It was recommended that the AGO and MOI adopt protocols relating to when "virginity tests" and other medical examinations can be required.

Mr. Shaban discussed, during working session no. 2, how police and prosecutors use the complaint of a rape victim, and the results of medical examinations to which she has consented to aid the rape investigation, in then prosecuting the victim for *zina*. Mr. Shaban pointed out that this violates many aspects of the procedure law, including the right to a defence and the right against self-incrimination.

Mr. Hartmann suggested that, to address this problem, the AGO could adopt a policy that would prohibit the use of voluntary medical examinations as the only evidence upon which to arrest a woman for *zina* where there is insufficient evidence that she has been raped, or to proceed with a prosecution for *zina*. The excerpts from the Pakistani Federal Shariat Court's decision in the case of *Mst. Safia Bibi vs. The State* (NLR 1985 SD 145) provided by Mr. Warraich, discussed above, may be of interest in this regard.

Dr. Sobhrang also spoke about how medical examinations are conducted in Afghanistan with no sensitivity to the victim. For instance, she described a hospital scene where a victim of multiple rape was being examined under the gaze of a multitude of onlookers, all vocally passing judgement on her morality.

Dr. Sobhrang and Mr. Hartmann recommended that protocols be adopted to respect the interests of victims. For instance:

- Medical exams should be conducted in private, e.g., in a separate room.

- Doctors should respect the confidentiality of their patients, and should treat victims of violence and women accused of crimes with the respect and care they afford to other patients. Special sensitivity training should be provided.

- Police stations and hospitals provide information to victims of violence against women about relevant medical and psychological services, as well as other relevant community agencies such as shelters.

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۷	تهیه شده توسط وکیل امینی رئیس بخش تحقیقات، لوی خارنوالی، "درارتباط با خشونت علیه زنان".	Submission by Wakil Aminy, Chief, Division of Investigation, AGO, "In Relation to Violence Against Women".	7.
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۱۱	تهیه شده توسط فوزیه امینی، رئیس بخش حقوقی وزارت امور زنان، "خشونت علیه زنان".	Submission by Faouzia Amini, Head of Legal Department, Ministry of Women's Affairs, "Violence against Women".	11.
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۲۴	کترین خمسی، مشاور حقوقی پروگرام، آیدلو (پروژه سیدا)، "گزارش از ورکشاپ تخنیکی: جندر و عدالت جنایی در افغانستان".	Kathryn Khamsi, Program Legal Counsel, IDLO (CIDA Project), "Report on Technical Workshop: Gender and Criminal Justice in Afghanistan".	24.

On May 15-16, the International Development Law Organization (IDLO) held a technical workshop on the subject of "Gender and Criminal Justice in Afghanistan". The technical workshop was conceptualized and organized by Kathryn Khamsi (IDLO Program Legal Counsel) and Najla Ayubi (Commissioner, Independent Election Commission of Afghanistan). It was part of a larger Canadian International Development Agency (CIDA) project implemented by IDLO: "Strengthening the Rule of Law in Afghanistan".

The technical workshop was intended to provide a forum in which Afghan legal professionals could discuss how Afghan criminal law is applied in cases involving women – the prosecution of violence against women, and the frequent re-victimisation of women victims by the criminal justice system. The discussion was limited to the formal criminal justice system, which is not to deny the significant gender issues presented by Afghanistan's informal justice system.

The idea was for the various institutions working in gender and criminal justice to speak to each other about how the criminal law is and should be applied in cases involving women in Afghanistan, and to hear of alternative approaches from colleagues from other jurisdictions. There was significant participation in the technical workshop from the Attorney General's Office (AGO); the defence bar; the National Parliament, including the Legislative and Gender Committees of both houses; the Ministry of Interior (MOI); the Supreme Court; the Ministry of Women's Affairs (MOWA); and civil society. Attendees numbered approximately 200 people on the first day and 180 on the second.

Participants were also invited to make written submissions on the issues to be addressed. These submissions, the index to which is included at Appendix 1 to this document, were circulated to all who attended the technical workshop.

The intention was to generate recommendations for increasing the equality between men and women before the criminal justice system guaranteed at Article 22 of the *Constitution of Afghanistan*, 2004. The workshop did not aim to – nor could it – exhaustively identify and address all gender issues in Afghanistan's criminal justice system. It was, rather, intended as a starting point for targeted discussion relating to legislative and institutional reform.

The technical workshop opened with a recitation from the Holy Qu'ran, and welcome comments from Charles Jakosa and Nipa Banerjee.

Two keynote presentations followed.

- Sohail Warraich, Co-ordinator (Law) for Shirkat Gah Women's Resource Centre in Lahore, spoke about the evolution of Pakistani legislation and case law relating to violence against women – in particular, honour killings and rape. In the course of this discussion, Mr. Warraich offered *shari'ah* and international law based arguments for criminal law change in favour of women.

- Hauwa Ibrahim, a Nigerian lawyer who has defended 90 cases under *shari'ah*-based criminal law and is currently a Yale World Fellow, outlined strategies for defending cases under *shari'ah*-based criminal law. In the course of this discussion, Ms. Ibrahim argued that – and outlined examples of how – constitutional guarantees, including in relation to due process, apply in such cases.

Three half-day working sessions then addressed the substance, procedure and implementation of the criminal law in Afghanistan. Set out below are the recommendations that were put forward during these sessions, and in written submissions by participants, followed by a summary of the discussions that occurred during the working sessions.

Recommendations

<u>The substance of the criminal law should be amended or supplemented as needed to:</u>

- Create a distinct offence of rape;
- Make more explicit that domestic violence, in all instances and in all its forms, including spousal abuse, is a crime; or at least clarify the scope of Article 53 of the *Penal Code*, 1976 to state that no right exists under *shari'ah* that would provide a defence to spousal abuse, meaning that obedience by a woman of her husband is of no relevance to an investigation or prosecution of such violence;
- Create an offence of child marriage, and increase the sentence for forced marriage; and
- Clarify whether or not "running away from home" is a crime.

<u>The criminal procedure law should be supplemented or amended as needed to:</u>

- Not require the complaint of a victim as a prerequisite for prosecution of violence against women – including for the crime of beating where the perpetrator is the victim's husband or one of the victim's "roots or branches". A victim's complaint should also not be required for the crime of *qazf* or for the crime of forced marriage;
- Provide that the testimony of a woman by itself may be sufficient evidence to convict in a criminal case. This principle is consistent with Article 22 of the *Constitution of Afghanistan*, 2004;

- Set out standards and procedures for investigation in cases of violence against women;
- Explicitly allow victims and witnesses to give evidence in confidentiality when their security is at risk. Although this is consistent with the *Constitution of Afghanistan*, 2004 (Article 128(2)), it is not specifically contemplated in the *Interim Criminal Procedure Code*, 2004 (Article 52(2));
- Provide procedural protections against victims of rape being prosecuted for other crimes, e.g. *zina*; and
- Explicitly state that Article 130 of the *Constitution of Afghanistan*, 2004 does not allow arrest for, or criminal conviction or prosecution of, acts not criminalized by a law as defined by Article 94 of the *Constitution*. This should be reinforced by sanctions for police, prosecutors, and judges who disregard the *Constitution* in this regard. Also, explicitly state that compensation will be awarded to any individual who is unjustly detained or prosecuted as contemplated by Article 55 of the *Constitution*.

<u>Institutional mechanisms should be adopted at police stations and within the MOI:</u>

- Special units that could receive complaints of violence against women on the model of the Family Response Units (FRUs) should be created in police stations, which will necessitate recruiting additional female officers and providing training in police techniques and family violence response techniques to officers that are assigned to the units. However, these units should not necessarily be exclusively staffed by women, as this might result in violence against women being viewed as only a female issue;
- The FRUs should be included in the *tashkiel* of the MOI. They should be given a clear mandate, defined roles and responsibilities, and be provided sufficient financial and other resources to operate;
- Investigative officers should be trained in domestic violence. Eventually, the staff of the FRUs should be given investigative responsibility;
- There should be clear policies and procedures that define the role and responsibilities of the police in family violence matters, including their limits; and
- Protocols should be developed for collaboration between the police and women's shelters, both to provide security to shelters, and to provide an alternative to protective detention for women victims of violence.

Institutional mechanisms should be adopted to improve police-prosecutor collaboration:

Protocols and procedures for collaboration between the prosecutors and police in investigation and prosecution of violence against women should be established. An MOI-AGO committee to monitor the progress of such cases, potentially also with an international advisor, should be considered.

Institutional mechanisms should be adopted within the AGO:

- Specialized units should be created in the prosecutor's offices to deal with violence against women. Again, these units should not necessarily be exclusively staffed by women; and
- Guidelines should be developed in consultation with the police on when, based on the severity of the injuries and on the previous history of violence, a case of violence against women will be prosecuted. These guidelines should explain why any injuries caused in a domestic violence situation would not be investigated and prosecuted if injuries of the same nature would be investigated and prosecuted in a non-domestic violence situation.

Mechanisms to improve the use of expert examinations and forensics should be adopted:

- Cases of violence against women should involve better forensic analysis;
- Forensic medicine facilities throughout Afghanistan should be updated. Equipment should be procured and provided not only to police stations but also to hospitals;
- Standardised forms setting out relevant information in cases of violence against women and instructions for dealing with victims should be developed and adopted for medical and judicial professionals;
- Sufficient numbers of female forensic examiners and medical experts should be recruited and trained to ensure that women are available to examine victims;
- Forensic training should be conducted for police, prosecutors and medical personnel. The training should cover relevant scientific concepts and methods as well as the manner in which expert medical evidence should be used in a legal case;
- The AGO and MOI should adopt a protocol relating to when "virginity tests" and other medical examinations can be required;

- The AGO should adopt a policy that would prohibit the use of voluntary medical examinations as the only evidence upon which to arrest a woman for *zina* in cases where there is not enough evidence to proceed against a man on a charge of rape; and

- Protocols should be adopted to respect the interests of victims during medical examinations. For instance, medical exams should be conducted in private, e.g., in a separate room. Doctors should respect the confidentiality of their patients and should treat victims of violence and women accused of crimes with the respect and care they afford to other patients. Special sensitivity training should be provided. Police stations and hospitals should provide information to victims of violence against women about relevant medical and psychological services, as well as other relevant community agencies such as shelters.

Institutional mechanisms that should be adopted and enhanced:

- Hospitals should adopt a policy of communicating, or be required to communicate, cases of violence against women to the police and prosecutor's office; and

- Shelter capacity should be enhanced.

A task force should be created to pursue the above recommendations, including to:

- Ensure that domestic violence is treated as a criminal offence, that perpetrators are brought to justice, and that victims are awarded redress;

- Implement other measures relating to victim and witness assistance recommended by "Justice for All", including by passing or amending legislation as necessary;

- Monitor respect for the rights of women accused and women in custody; and

- Review the process of legal reform in the areas noted above.

Working session No. 1, Criminal Law – Substance:

Moderated by Judge Faouzia Amini, Head of the MOWA Legal Department, this session addressed how violence against women in its various forms can be prosecuted under the criminal law of Afghanistan. This session also addressed whether women in Afghanistan can be prosecuted for activity that is not criminalized by legislation but is considered immoral – for example, running away from home.

Judge Amini began by contextualising the discussion of gender and criminal justice. She outlined the types of violence prevalent in Afghanistan – social violence, physical, mental, cultural and economic. In 2004 and 2005, a total of 2600 cases of violence against women were referred to MOWA. Judge Amini described once such case:

> A 6-year-old girl was forced to marry a boy of the same young age because her father was in debt. When she moved to her husband's house, her in-laws were very mean and cruel to her. The girl was force to do all the chores at home. One day, when she was doing the laundry, she fell asleep. Her in-laws poured boiling water over her body. She was scalded and the flesh over her ribs was removed. They then put salt on her wounds, which is the most severe kind of violence. As they were not feeding her, the neighbors would give her pieces of bread through the cracks of the wall separating their residences. Eventually, the neighbors encouraged the girl to complain to the police.

Judge Amini concluded the session by calling for a task force to pursue the recommendations emerging from the technical workshop, a recommendation that was also put forward by Justine Mbabazi, medica mondiale's Legal Aid Program Manager. Among other things, the task force would:

- Ensure that domestic violence is treated as a criminal offence, that perpetrators are brought to justice and that victims are awarded redress,
- Monitor respect for the rights of women accused and women in custody, and
- Review the process of legal reform in the areas recommended by the technical workshop.

Prosecution of violence against women:

Domestic violence

Domestic violence is a crime under Afghan law. It may, for instance, constitute beating and laceration under Chapter 5 of the *Penal Code*'s Book II, Section 2, or even murder under Chapters 1-2. Yet those investigating criminal cases of domestic violence, and criminal and family courts facing such cases, regularly consider whether the violence was a response to a woman's disobedience. In criminal cases, this frequently leads to a decision not to prosecute a case of beating, or reduction in the sentence of the accused.

Is a wife's obedience legally relevant in a prosecution for domestic violence? Article 53 of the *Penal Code*, 1976 provides that:

> Commitment of a criminal act with good will for the purpose of exercising a right, which is granted to a person by the way of religious or other laws, shall not be considered a crime.

The question, then, is whether *shari'ah* gives a husband the right be beat his wife.

Presentations by Sediqa Balkhi, Chairman of the Gender Commission of the *Meshrano Jirga*, and Ashraf Jaleb, Head of Criminal Department of the MOJ's Legislative Institute (the *Taqnin*) addressed this question, and answered that the *shari'ah* does not give a husband such a right.

They cited and discussed in their presentations verses of the Qu'ran that require man and wife to live in harmony with each other, and without hierarchy between them:

> *Surat al-Rum*, verse 21: "And among His signs is this, that he created for you mates from among yourselves, so that you may dwell in tranquillity with them, and He has put love and mercy between your (hearts): Verily in that are signs for those who ponder."
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> *Surat al-Nisāa*, verse 187: "They (your wives) are your garment and you are their garment."
>
> *Surat al-Nisāa*, verse 1: "O Humans revere your Guardian Lord, Who created you from a single person created of like nature, its mate, and from this scattered (like seeds) countless men and women."

They also addressed verse 34 of *Surat al Nisāa*: